BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation	)))	WT Docket No. 95-157 RM-8643

COMMENTS OF PRIMECO PERSONAL COMMUNICATIONS, L.P. TO FURTHER NOTICE OF PROPOSED RULE MAKING

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PrimeCo Personal Communications, L.P. ("PrimeCo") submits these comments to the Commission's further notice of proposed rule making (the "*Notice*") in the matter captioned above. In the *Notice*, the Commission seeks comment on two issues:

- Should the voluntary negotiation period be shortened and the mandatory period lengthened for D, E, and F blocks as well as for the C block?

- Should microwave incumbents be permitted to relocate some of their own links and obtain reimbursement rights pursuant to the cost-sharing plan adopted in the *First Report and Order*?

PrimeCo opposes a change in the relocation rules for the remaining PCS bands and would accept the participation of the incumbent microwave users in the cost-sharing plan only if it is satisfied that abuse of the system is not possible.

Microwave Relocation.

In establishing its relocation rules, the Commission has, in the face of objections from the personal communications industry and members of Congress, repeatedly asserted the fairness of these rules and the balance they strike between the interests of the

new emerging technologies licensees and the incumbent microwave users.[1] Except for the fact that the A and B band PCS licensees have already paid in full for their licenses, PrimeCo can find nothing to distinguish the potential C, D, E, or F block licensees from their A and B band counterparts that merits relief from rules that were "the product of extensive comment and deliberation prior to the initial licensing of PCS."[2]

In rejecting the arguments of the A/B licensees for a change in the relocation rules, the *First Report* offers two reasons for the Commission's refusal to change the rules. The first is that the rules were in place when the auctions were conducted and the

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[1] "We seek to promote an efficient and equitable relocation process, which minimizes transaction costs and maximizes benefits for all parties, including incumbents, PCS licensees, and the public. ...[W]e stated that our intent was not to reopen [the existing relocation procedures]because we believe that the general approach to relocation in our existing rules is sound and equitable." *Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation,* WT Docket No. 95-157, *First Report and Order* (April 30, 1996) at ¶¶ 9, 10 (hereafter "*First Report*"). *See also, Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies,* ET Docket No. 92-9; RM-7981; RM-8004 (November 28, 1994), *Second Memorandum Opinion And Order at* ¶ 1 ("By this action, we hope to encourage expeditious relocation of incumbent users of the emerging technologies band, and increase the speed with which new technologies and services will be brought to market in that band. At the same time, we believe that our actions properly balance the interests of the different parties and will safeguard the rights of incumbents and ensure a smooth transition for them and their customers."); *Amendment of the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation,* WT Docket No. 95-157, *Notice of Proposed Rule Making* (October 13, 1995) at ¶72 ("We continue to believe that the current negotiation process is the most appropriate means for determining comparability of the existing and replacement facilities. We believe that, in the vast majority of cases, this procedure provides parties with the necessary flexibility to negotiate terms for determining comparability that are mutually agreeable to all parties without the need for government intervention or mandate.").

[2] *First Report* at ¶ 10.

bidders participated in the auction with that knowledge.[3] This observation applies with equal force to all future auctions and is not ground for a change in the rules. The second reason offered is that the Commission did not wish to disturb the negotiations in progress between the A/B licensees and the incumbents by changing the rules in midstream.[4] Since this is not the case with the remaining PCS licensees, the FCC concludes that changing the rules "may not raise the same concerns."[5]

Whatever the merit of this point, it does not offer a reason for changing the rule. In making the proposal, the *Notice* refers to no facts showing that the existing rules have failed in their purpose, and it makes no proposed findings that the existing rules have not achieved the goals of efficiency and fairness that the Commission has claimed for them. Surely something more compelling than a desire to tinker with rules heretofore pronounced satisfactory must underlie the Commission's action before it confers on PrimeCo's competitors a benefit systematically denied to the A/B licensees. In PrimeCo's view, no such compelling circumstance appears in anything the Commission has ever stated about its microwave relocation rules.

Aside from the unfairness in treating a homogeneous group of CMRS carriers differently for relocation purposes, adopting another set of microwave rules can only increase the complexity of the entire process and add cost to the administration of the clearinghouse. Given that the Commission apparently believes it present relocation rules are operating satisfactorily, it should not create additional and unwarranted regulation.

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[3] *Id.*
[4] *Id.* at ¶ 13.
[5] *Notice* at ¶ 95.

Accordingly, PrimeCo urges the Commission not to adopt a change in the microwave relocation rules.

Incumbent Cost Sharing.

The *Notice* also proposes allowing microwave incumbents who relocate their own facilities to participate in the cost-sharing plan. PrimeCo views this proposal skeptically.

In the first place, it is hard to imagine why an incumbent, armed with the enormous leverage of the relocation rules, would ever undertake to relocate its own facilities. As the rules currently stand, the most unreasonable and recalcitrant incumbent is *always* entitled to comparable facilities, recurring costs, and (in the case of an "involuntary relocation") a twelve-month trial period. And while the rules purport to limit "premiums" to the voluntary period only, it is clear that if an incumbent demands them in the mandatory period, the PCS licensee is "free" to pay them.[6] Moreover, there is every reason to suspect that an incumbent who moves its own facilities will not do so at the least cost. The cost-sharing plan, by contrast, relies upon the adverse interests of the parties as a check on unnecessary expense.[7] Consequently, in the unlikely event that an incumbent could not exploit the relocation rules to their fullest, access to the cost-sharing plan could present the incumbent with the possibility of an arbitrage.

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[6] The rule says that the PCS licensee has "no obligation to pay for premiums during an involuntary relocation." *First Report* at ¶ 2. Of course, the incumbent has no obligation to move either, especially if it does not get what it demands. Indeed, there is a good case to be made that, even during the so-called "involuntary relocation," an incumbent is still in a position to demand a premium.

[7] Unnecessary expense in the context of the relocation negotiations is a flexible concept. In any case, there is a cap on relocation expenses under the cost-sharing plan, and amounts beyond that sum ($250,000 per link plus $150,000 if a new or modified tower is required) are borne by the relocator.

In PrimeCo's view, two things must occur before the incumbents can be permitted access to the cost-sharing plan. First, there needs to be a clearer and more convincing explanation of the incumbents' need to participate. Without such an explanation, PrimeCo will continue to view this proposal as one that will only inject more mischief into an already flawed process. Assuming that such an explanation is forthcoming, however, a set of rules to ensure fair treatment is needed. PrimeCo proposes the following:

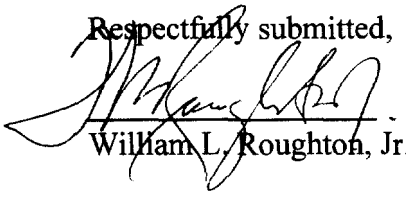
- Incumbents will be eligible for reimbursement only for links causing or receiving interference as determined by the proximity threshold test described in the *First Report*.
- Incumbents will be entitled to comparable facilities only.
- Following an incumbent's submission to the clearinghouse of a request for reimbursement. the clearinghouse shall have prepared, at the incumbent's expense, by an independent third party a cost estimate of the relocation expense. The incumbent shall be entitled to the lesser of the actual expense or the cost estimate. In no case shall any payment exceed the caps set forth in the Commission's rules
- For purposes of calculating the *pro rata* reimbursement amount, the incumbent shall be considered the PCS relocator.
- There shall be no twelve-month trial period for an incumbent relocating its own facilities.

These safeguards will ensure that only actual costs are submitted for reimbursement and that all parties are treated fairly.

CONCLUSION

For the foregoing reasons, PrimeCo Personal Communications, L.P. urges the Commission not to adopt separate relocation rules for licensees in the C, D, E, and F bands. In addition, PrimeCo further urges the Commission not to permit incumbent microwave users who relocate their own facilities to have access to the cost-sharing plan until a sufficient demonstration of the need for such access is made. Upon such demonstration, the Commission should adopt the rules proposed by PrimeCo.

Respectfully submitted,



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